United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Signed

76-4125

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ESTATE OF ANTON L. TRUNK, Deceased,
Clara P. Trunk, Executrix,

Appellant

v.

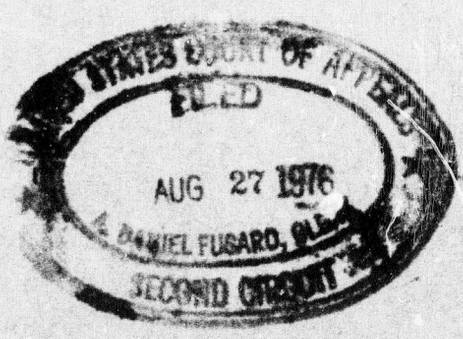
COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE DECISION OF THE

UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE



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No. 76-4125

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the Tax Court was correct in ruling that the sum of $200,000 received by the wife of the decedent failed to qualify for the marital deduction allowance authorized under Section 2056 of the Internal Revenue Code of 1954.

2. Whether the Tax Court was correct in ruling that, under applicable State law, a portion of the federal estate and state inheritance taxes attributable to life estates preceding charitable remainders were required to be charged against the corpus of residuary trusts, thus reducing the amount of the allowable charitable deduction authorized under Section 2055 of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

This appeal involves a deficiency in estate taxes. (R. A-3.)[1/] The findings of fact and opinion of the Tax Court (Judge Quealy) in favor of the Commissioner, filed November 3, 1975, are reported at 65 T.C. No. 20. (R. A-137 - A-162.) Decision in the Commissioner's favor in the sum of $50,848.42 was entered on February 17, 1976. (R. A-163.) The taxpayers filed a timely notice of appeal on May 5, 1976. (R. A-2, A-165.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

The facts of this case, as found by the Tax Court (R. A-138 - A-150), or as established elsewhere in the record, are as follows:

The decedent, Anton L. Trunk, died a resident of the State of New York on May 14, 1968. In his will the decedent named his wife Clara as executrix and residuary legatee after payment of specific bequests to individuals, and the setting aside of particular assets, to be held in three trusts, as described below. (R. A-139.)

Under Paragraph Sixth of his will, decedent established Trust Number One, under which the decedent bequeathed real property located on 164th Street, Jamaica, Long Island, New York to Chemical Bank New York Trust Company and Harold J. Treanor, as

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1/ "R." references are to the separately bound record appendix.

trustees, and directed that the income should be paid over as follows (R. A-51 - A-58, A-140 - A-142):

> (a) To the payment and discharge of any and all liabilities and obligations arising out of or connected with the operation and maintenance of the trust property including, but not limited to, the payment of interest and amortization of mortgages, the discharge and satisfaction of mortgages, the payment of taxes and water charges, if any, as well as the payment of administration, legal expenses and Federal and State Estate Taxes and Income Taxes.
>
> (b) To the payment out of the remaining net income of the following amounts to the following named persons:
>
> (1) To my wife, CLARA POEY TRUNK, during her life, the sum of TEN THOUSAND DOLLARS, annually, plus all of the annual rent income remaining after the payments required by subdivisions (2), (3), (4), and (5) hereof;
>
> (2) To HELEN L. KENT, during her life, the sum of THREE THOUSAND DOLLARS, annually;
>
> (3) To FRANK P. POEY, during his life, the sum of THREE THOUSAND DOLLARS, annually;
>
> (4) To ANN K. MACKENZIE, during her life, (except as hereinafter provided in subdivision (c) hereof) the sum of ONE THOUSAND TWO HUNDRED DOLLARS, annually; and
>
> (5) To LULU HAMMOND, during her life, the sum of ONE THOUSAND TWO HUNDRED DOLLARS, annually.
>
> If any of the persons above named in this Paragraph SIXTH shall die prior to the termination of this trust leaving my wife, CLARA POEY TRUNK, surviving, I order and direct my TRUSTEES thereafter to pay over the income which such deceased person would have been entitled to receive, if living, to my said wife, CLARA POEY TRUNK, during her life and, upon her death, such income payments, including those to which my wife, CLARA POEY TRUNK, would have been entitled to receive, if living, shall be paid to HELEN L. KENT, during her life. Upon the death

of HELEN L. KENT, if she shall survive my wife, CLARA POEY TRUNK, or upon the death of my wife, CLARA POEY TRUNK, if she shall survive HELEN L. KENT, I order and direct my TRUSTEES to pay over the income to which the survivor of either CLARA POEY TRUNK or HELEN L. KENT would have been entitled to receive, as aforesaid, to CLARA M. GIRVIN; and upon the death of CLARA M. GIRVIN or if she shall not survive my wife, CLARA POEY TRUNK, and HELEN L. KENT, I order and direct my TRUSTEES to pay over the net income of this trust to LILIAS P. GIRVIN and BARBARA G. MAHONEY, in equal shares, and, upon the death of either of them, to the survivor of them.

(c) Upon the decease of all of the beneficiaries mentioned in subdivision (b) hereof, or if either ANN K. MACKENZIE or LULU HAMMOND shall be the last survivor of the beneficiaries mentioned therein, this trust shall cease and terminate and thereupon I direct my TRUSTEES to transfer, deliver and convey the property constituting the principal of this trust to ST. JOHN'S EPISCOPAL CHURCH OF LARCHMONT, NEW YORK, to be its property, absolutely and forever, but subject, nevertheless, to existing mortgages, leases, encumbrances, taxes and liens, if any. As this bequest is to commemorate my wife's memory and to give recognition to her charitable labors, I direct that this gift be known as, and referred to as THE CLARA POEY TRUNK FUND.

* * *

(d) I direct that said TRUSTEES are not to mortgage said property constituting the trust for more than the amount of any mortgage indebtedness on said property at the time of my decease except that if, in the exercise of sound judgment, said TRUSTEES determine that there is need for increased mortgage indebtedness, and my said TRUSTEES shall so certify in writing, then and in that event, said TRUSTEES have the right to mortgage said property in an amount exceeding the amount of the mortgage indebtedness existing at the time of my decease, provided that the proceeds from any such increased or additional mortgage indebtedness be applied to and used solely and directly for the maintenance, benefit or improvement of said property.

Anything hereinabove to the contrary notwithstanding, in the event FIRST NATIONAL CITY BANK (formerly THE NATIONAL CITY BANK OF NEW YORK) or any institution as successor thereof is no longer the lessee or tenant, the TRUSTEE may, in the exercise of sound discretion, mortgage the property constituting the trust for an amount in excess of that in existence at the time of my decease, provided the proceeds from such increased or additional mortgage are used to improve the property constituting the trust by the erection of a new building or buildings and/or enlargement of any existing building and/or its repair, alteration or modernization.

No obligation under the foregoing provisions shall be imposed upon any mortgagee to inquire or determine if the proceeds of any such mortgage loan are used and applied as above permitted; nor shall the violation of the aforesaid direction by my TRUSTEES in the use and application of the proceeds of such mortgage loan in any wise effect or impair the validity of any mortgage effecting the real property or the leases made in connection therewith, constituting the corpus of this trust.

* * *

(i) Notwithstanding the provisions of subdivision (b) of this Paragraph SIXTH, in the event that the net income during the existence of this trust in any year shall not be sufficient to pay the annual sum provided for my wife, CLARA POEY TRUNK, for HELEN L. KENT, for FRANK P. POEY and for ANN K. MACKENZIE, then, and in such year, I direct that the net income shall be distributed so as first to provide for payment in full of the amount set forth for my wife, CLARA POEY TRUNK, and out of the remaining net income, to payment in full of the amount set forth to HELEN L. KENT, and out of the remaining net income, to pay to FRANK P. POEY and ANN K. MACKENZIE, shares proportionate to their bequests in (b) hereof.

(j) In the event that the net income in any year shall be insufficient to meet the annual payments provided for in subdivision (i) of this Paragraph SIXTH, then, and in such event, so long as both my wife, CLARA POEY TRUNK, and HELEN L. KENT shall survive, my TRUSTEES shall pay over the net income as follows: THREE THOUSAND DOLLARS per annum to HELEN L. KENT and the remaining net income to my wife, CLARA POEY TRUNK. But in the event that my said wife, CLARA POEY TRUNK,

> shall survive HELEN L. KENT, all of said net annual income provided for in this subdivision (j) shall be paid over by my TRUSTEES to my wife, CLARA POEY TRUNK. However, if said HELEN L. KENT shall survive my wife, CLARA POEY TRUNK, all of said net annual income provided for in this subdivision (j) shall be paid over by my TRUSTEES to HELEN L. KENT. Upon the demise of both CLARA POEY TRUNK and HELEN L. KENT (anything in this trust to the contrary notwithstanding), I direct my TRUSTEES to distribute the net income to the surviving beneficiaries mentioned in subdivision (b) hereof in the proportion in which they have been provided for in said subdivision (b) and, in default of such beneficiaries, such net income shall be distributed as provided in subdivision (c) hereof.

Under this provision, property having a value of $372,000 was transferred to the trust, subject to mortgages in the sum of $135,000, leaving a net value of the property in trust of $237,000. The charitable remainderman, St. John's Episcopal Church, had a net interest valued at .3489 of the whole trust. (R. A-139 - A-140.)

Under Paragraph Seventh of his will, the decedent established Trust Number Two, under which he bequeathed real property located at John and Nassau Streets, Manhattan, New York, New York to Chemical Bank New York Trust Company and Harold J. Treanor, as trustees, and directed that the income should be paid over as follows (R. A-61, A-144):

> (a) To the payment and discharge of any and all liabilities and obligations arising out of or connected with the operation and maintenance of the trust property including, but not limited to, the payment of interest and amortization of mortgages, the discharge and satisfaction of mortgages, the payment of taxes and water charges, if any, as well as the payment of administration, legal expenses and Federal and State Estate Taxes and Income Taxes.

(b) To the payment quarter-annually to my wife, CLARA POEY TRUNK, of all of my share of net income from the aforesaid property during her life, and, upon her death, all of my share of net income from the aforesaid property to LILIAS P. GIRVIN and BARBARA G. MAHONEY, in equal shares, and, upon the death of either of them, to the survivor of them.

(c) Upon the death of the survivor of the beneficiaries metnioned in subdivision (b) hereof, this trust shall cease and terminate and thereupon I direct my TRUSTEES to transfer, deliver and convey the property constituting the principal of this trust to the PRESBYTERIAN HOME FOR AGED WOMEN IN THE CITY OF NEW YORK, presently located at 49 East 73rd Street, New York, New York, to be its property, absolutely and forever, but subject nevertheless, to existing mortgages, leases, encumbrances, taxes, and liens, if any. As this bequest is to commemorate my wife's memory and to give recognition to her charitable labors, I direct that this gift be known as, and referred to as, THE CLARA POEY TRUNK FUND.

Further, Trust Number Two provided (R. A-62 - A-63, A-145):

In the event my TRUSTEES shall certify in writing that it is requisite, necessary or desirable to borrow a sum of money, my said TRUSTEES are hereby authorized and empowered to do so up to, but not in excess of, the sum of $200,000.00 and, for such purpose, to mortgage my aforesaid interest in the property constituting the corpus of this trust, and to make, issue and deliver such bond or note and mortgage and any other instruments as may be proper and necessary. Said sum so borrowed shall be turned over, in whole or in part, to my wife, CLARA POEY TRUNK, if so requested by her in writing and/or used, in whole or in part, to pay and discharge any Federal of [sic] New York State Estate or Inheritance Taxes, under any of the provisions of this, my Will.

Under this provision, property having a value of $750,000, was transferred to the trust, subject to a mortgage in the sum of $247,765.63, leaving a net value of the property in the trust of $502,234.37. The charitable remainderman, Presbyterian Home

for Aged Women in the City of New York, had a net interest valued at .3525 of the entire trust. (R. A-143.)

Under Paragraph Eighth of his will, the decedent established Trust Number Three, under which he bequeathed his interest in an agreement, "including, but not limited to, the stock referred to therein and all payments of principal due and to become due under and pursuant to the terms, provisions and conditions of the aforesaid Agreement" to his trustees Edmund F. Wagner and Chemical Bank New York Trust Company "to collect all such principal and apply and pay over the same to ST. JOHN's EPISCOPAL CHURCH OF LARCHMONT, NEW YORK, except as hereinafter provided in subdivisions (a), (b) and (c) hereof" (R. A-66 - A-70, A-147):

> (a) To the payment and discharge of any and all liabilities and obligations arising out of or connected with the operation and maintenance of the trust including, but not limited to, Federal and State Estate Taxes and Income Taxes, if any.
>
> (b) To the payment to my wife, CLARA POEY TRUNK, during her life, of the annual net instalments of principal as they accrue and, upon her death:
>
> (c) (1) To the payment to HAROLD J. TREANOR, during his life, of 50% of the annual instalments of principal as they accrue and, upon his death, the said 50% which he would have received, if living, shall be paid to his wife, EDITH M. TREANOR, during her life, and, upon her death, the said 50% which she would have received, if living, shall be paid to HELEN L. KENT.

(2) To the payment to HELEN L. KENT, during her life, of 25% of the annual net instalments of principal as they accrue, and to the payment to LILIAS P. GIRVIN, during her life, of 25% of the annual net instalments of principal as they accrue. If HELEN L. KENT survives LILIAS P. GIRVIN, she shall receive the 25% share which LILIAS P. GIRVIN would have received, if living. In like manner, if LILIAS P. GIRVIN survives HELEN L. KENT, she shall receive the 25% share which HELEN L. KENT would have received, if living.

(3) Upon the death of both HELEN L. KENT and LILIAS P. GIRVIN, the payment of the 50% of the annual net instalments of principal provided for in subdivision (2) hereof, as they accrue, shall be paid (per stirpes and not per capita) to the issue of BARBARA G. MAHONEY, surviving at the time of my decease. Upon the death of the survivor of EDITH M. TREANOR, HAROLD J. TREANOR and HELEN L. KENT, the payment of the 50% of the annual net instalments of principal provided for in subdivision (1) hereof, as they accrue, shall be paid to ST. JOHN'S EPISCOPAL CHURCH OF LARCHMONT, NEW YORK; and upon the death of the final survivor of the beneficiaries provided for in this subdivision (3), the remaining 50% of said annual net instalments of principal, as they accrue, shall likewise be paid to ST JOHN'S EPISCOPAL CHURCH OF LARCHMONT, NEW YORK.

As this bequest is to commemorate my wife's memory and to give recognition to her charitable labors, I direct that this gift be known as, and referred to as, THE CLARA POEY TRUNK FUND.

While the said Agreement dated the 12th day of April, 1960 remains in effect, my share of the corporate TRUSTEE's commissions, as fixed by said Agreement, shall be a charge upon and paid out of the principal of the trust. The corporate TRUSTEE's commissions shall be paid before any disbursements of principal herein provided.

* * *

I hereby clothe my TRUSTEES with all of the rights and powers possessed by me under and by virtue of the terms, provisions and conditions of said Agreement of April 12th, 1960 and hereby authorize

> and empower my TRUSTEES to take any and every action at law or equity to enforce, defend and sustain the terms, provisions and conditions of said Agreement of April 12th, 1960 made in my behalf as, in their sole discretion, they may deem advisable, necessary or expedient, and I authorize my TRUSTEES to engage counsel for any purpose that, in their discretion, they may deem advisable, necessary or expedient. My TRUSTEES are authorized to deduct from any principal or monies of the trust any reasonable legal fees and any reasonable disbursements which they may incur in enforcing, defending and preserving said Agreement of April 12th, 1960 or in obtaining and collecting the principal and monies due or to become due under said Agreement.

By letter dated July 23, 1971, the decedent's widow requested Treanor, the trustee, to "turn over and deliver to me the sum of $200,000 as my elective bequest as provided in Paragraph Seventh of Tony's last will and testament," stating (R. A-147 - A-148):

> As you know Tony always thought of me as the most important beneficiary of his estate and willed the residuary to me. Because of debts and administrative expenses, the amount remaining outright to me as residuary beneficiary was less than $365,000.00 out of an estate of $1,800,000.00. It was to provide against a contingency such as this that Tony gave me the election of requesting up to an additional amount of $200,000.00. Although I know it will result in less of a bequest to the Presbyterian Home for Aged Women in the City of New York, I know that it would be Tony's wish that I receive this amount in view of the small remainder of the residuary which passes to me.

By letter dated August 2, 1971, Treanor agreed to pay the widow such sum, and on August 10, 1971, Treanor delivered a check drawn on Trust Number Two in the sum of $198,500 ($200,000 less legal expenses owed by the widow) to the widow. (R. A-148.)

In a subsequent accounting, the trustees reported the $200,000 amount as a distribution of principal to the widow, and this accounting was agreed to by all beneficiaries of Trust Number Two. (R. A-149.)

In the estate tax return, the executrix claimed a marital deduction allowance in the sum of $519,522.10, $200,000 of which was attributable to the amount paid the widow by the trustees under Paragraph Seventh of the decedent's will. In such return the executrix also claimed a charitable deduction in the sum of $223,385.83 for the bequests to St. John's Episcopal Church under Paragraphs Sixth and Eighth of the will, and to the Presbyterian Home for Aged Women in the City of New York under Paragraph Seventh of the will, such deduction having been calculated without charging the federal estate taxes and state inheritance taxes attributable to the life estates preceding the charitable remainders against the corpus of the trusts providing for such charities. (R. A-139, A-149 - A-150.)

The Commissioner disallowed the marital deduction attributable to the $200,000 payment, and the charitable deduction to the extent it failed to take into account the amount of federal and state estate and inheritance taxes attributable to the preceding life estates as a charge against the respective trusts' corpus. (R. A-12.) The Tax Court, after comparing the provisions of Paragraphs Sixth and Seventh of the decedent's will, concluded (R. A-157, A-158) that the decedent did not intend to bequeath outright an additional $200,000 to his wife, but that by such

provision the decedent was (R. A-155, A-156) "providing a source of funds to meet the liability for inheritance taxes, or the bequests to his wife otherwise provided for in the will."[2/] Accordingly, the Tax Court rejected the estate's contention that the relevant clause of Paragraph Seventh was an unconditional bequest to the widow, and also rejected the estate's contention that the relevant clause amounted to an absolute power of appointment to the widow. (R. A-157, A-158.) Finally, the Tax Court concluded that nothing in Paragraphs Sixth or Seventh served to negate the rule of apportionment mandated by state law that, where no provision was otherwise made in the will, and where the will contains a bequest of a life estate with remainder over, the tax attributable to the life estate is chargeable against principal, without apportionment between life interest and the remainder. (R. A-160 - A-162.) From that determination the estate has appealed.

2/ In so ruling, the Tax Court rejected as inadmissible the testimony of the attorney who drew the will, at the decedent's direction, regarding the declared intent of the decedent that it was the decedent's expressed intention to give his wife $200,000 if she needed it. (R. A-156 - A-157.)

SUMMARY OF ARGUMENT

I

The first issue on appeal concerns a provision in the decedent's will which provided that if the trustees certified in writing that it was necessary to borrow money, they were authorized to borrow up to $200,000 and to pay such sum to decedent's wife "if so requested by her in writing and/or used, in whole or in part, to pay and discharge any * * * Estate or Inheritance Taxes, under this, my Will."

The Tax Court correctly denied the estate's attempt to claim an additional marital deduction of $200,000, under Section 2056(a) of the Internal Revenue Code of 1954, for an amount paid the decedent's wife, pursuant to this provision. This determination was correct. The clause authorizing payment of up to $200,000 to the wife was, considering the context of the entire will, merely intended as authorization for the trustees of one of the trusts to borrow money in order to provide the wife as executrix with funds to pay either the estate and inheritance taxes owed by the estate, or to fund the bequests to her, as beneficiary. Moreover, the Tax Court rightly refused to accept as controlling the testimony of the testator's attorney that testator's intent was to bequeath an additional $200,000 to decedent's widow, if she needed it, since this testimony contradicted the written words of the testator. Since this amount received by the wife was not bequeathed to her absolutely, and in addition to other bequests to her concerning which the

estate had already been allowed a marital deduction, such sum failed to qualify for an additional marital deduction.

Moreover, even if this language of the will was construed as providing the wife with an additional sum up to $200,000, the Tax Court properly denied an additional marital deduction for such payment because the wife's interest was "terminable," within the meaning of Section 2056(b)(1) of the Code. The testator clearly provided that three acts must occur after his death before the wife's right to an additional sum became certain: (1) the trustees had to certify in writing that it was necessary to borrow the money; (2) the wife had to request in writing that the money be paid to her; and (3) the wife wife had to determine that the borrowed money was not needed to pay estate and inheritance taxes. Failure of any one of those acts to occur before the wife's death would result in termination of her right to receive such payment. Accordingly, the wife's interest was "terminable" because it would terminate at the wife's death, and the interest in the fund would pass without consideration to the other beneficiaries of the trust, who would enjoy such interest upon termination of the wife's interest.

II

The second issue on appeal concerns the question of whether the decedent in his will clearly indicated an intention to avoid the apportionment rules established under the law of the State of New York. Section 2055(c) of the Internal Revenue Code of 1954 requires that the amount of a charitable deduction for

estate tax purposes be reduced by those estate or inheritance taxes which are, under the decedent's will or under the laws of the jurisdiction administering the estate, payable out of such charitable bequest. Section 2-1.8 of the Estates, Powers and Trusts Law of the State of New York provides that unless the testator provides to the contrary, where a disposition is made of an estate for life, with remainder over, the tax apportionable to such life interest is chargeable and payable out of the principal of the fund, without apportionment between the temporary interest and the remainder. In this case the will, properly construed, does not avoid charging the charitable remainders with the burden of such estate taxes. The provisions of Paragraphs Sixth (a) and Seventh (a), relied upon by the taxpayers, merely designate the source of the funds to be used to pay the specified taxes, but, read in the context of the entire will, do not shift the ultimate burden of those taxes from the charitable remainder interests. While he directed that the income from particular trusts be used to pay estate taxes, the testator was clearly not attempting to avoid the apportionment statute, since he provided in Paragraph Seventh for the borrowing of funds with which to pay those taxes.

ARGUMENT

I

THE TAX COURT CORRECTLY DENIED THE ESTATE A MARITAL DEDUCTION CONCERNING THE SUM OF $200,000 WHICH WAS PAYABLE TO HIS SURVIVING SPOUSE UNDER CERTAIN CONDITIONS

The first issue on this appeal concerns the propriety of the Tax Court's denial of a marital deduction to the estate with respect to a payment of $200,000 under Paragraph Seventh of the decedent's will. That paragraph states, in pertinent part (R. A-145):

> In the event my TRUSTEES shall certify in writing that it is requisite, necessary or desirable to borrow a sum of money, my said TRUSTEES are hereby authorized and empowered to do so up to, but not in excess of, the sum of $200,000.00 and, for such purpose, to mortgage my aforesaid interest in the property constituting the corpus of this trust, and to make, issue and deliver such bond or note and mortgage and any other instruments as may be proper and necessary. Said sum so borrowed shall be turned over, in whole or in part, to my wife, CLARA POEY TRUNK, if so requested by her in writing and/or used, in whole or in part, to pay and discharge any Federal of [sic] New York State Estate or Inheritance Taxes, under any of the provisions of this, my Will.

The Tax Court, after examining all of the provisions of the decedent's will, concluded that under the language quoted above, the decedent "gave the trustees discretion to borrow funds against the security of the trust property either to pay and discharge 'any' federal or state inheritance taxes or to make distribution to the decedent's wife" pursuant to other distributive provisions of decedent's will in favor of his wife. (R. A-155 - A-156.) Since the provision in

question did not, in the Tax Court's view, authorize payment of the additional sum of $200,000, in addition to the other bequests which the decedent had made in favor of his wife, payment of that sum to the widow did not qualify for the marital deduction. See Section 2056(a) of the Internal Revenue Code of 1954, Appendix, infra, providing for a marital deduction in an "amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse."

Initially, the Commissioner submits that the Tax Court's reading of the will, considered in its entirety, is correct, and that the provision in question clearly concerns solely the source of funds to cover the payment of either estate or inheritance taxes, or the funding of other bequests to the wife. Under the provisions of the decedent's will the wife was to receive the residue of the estate, after the payment of certain specific bequests, with the exception of three specific assets, which were put into separate trusts as follows.

The Long Island property was bequeathed in trust under Paragraph Sixth of the will for the lives of particular individuals, the remainder at the end of those lives to be paid to a charity. More particularly, no provision for distribution of principal was provided for until the termination of the trust, but it was specifically provided that the income of the trust was to be used to pay obligations and liabilities of the trust, including interest and amortization of the mortgage, and expenses of administration, and federal and state estate taxes and income taxes, with the "remaining net income" to be distributed to

particular individuals, including the wife, in yearly amounts totalling $18,400. (R. A-52 - A-53, A-140 - A-141.)[3] This trust had a specific prohibition against sale so long as the current tenant (First National City Bank) or any institutional successor continued to lease the premises, and permitted the trustees to mortgage the property only under the most stringent of conditions: specifically, to provide funds to "the maintenance, benefit or improvement of said property."[4] (R. A-54 - A-55.)

The Manhattan property was bequeathed in trust under Paragraph Seventh of the will, the trust res to be distributed upon the death of three enumerated income beneficiaries to a charity. The income of the trust was to be used to pay the obligations and liabilities of the trust, including interest on the amortization of the mortgage, expenses of administration, and federal and state estate taxes and income taxes, with the "net income" to be paid, first to decedent's wife, and then, after her death, to two other individuals. (R. A-62.) Under this trust, the trustees were authorized to sell the property constituting the trust res, to mortgage the property for any purpose, and specifically to mortgage the property up to the

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3 / Alternative payments were enumerated in the event that the net income in any year turned out to be insufficient to meet the annual payments originally provided for. (R. A-58.)

4 / The trust also authorized the trustees to mortgage the property in excess of current indebtedness in the event the current tenant or institutional successor ceased to occupy the premises as tenant, provided that the proceeds should be used solely to erect a new building, or improve or enlarge the existing facilities. (R. A-55.)

sum of $200,000, such borrowed sum to be "turned over, in whole or in part, to my wife, CLARA POEY TRUNK, if so requested by her in writing and/or used, in whole or in part, to pay and discharge any Federal or New York State Estate or Inheritance Taxes, under any of the provisions of this, my Will." [Emphasis supplied.] (R. A-62 - A-64.)

Finally, a certain agreement was bequeathed in trust under Paragraph Eighth of the will, which provided that the principal coming due under the agreement was to be used to pay liabilities and obligations of the trust, including federal and state estate taxes and income taxes, the balance of the principal payments to be paid to particular individuals for their lives, and to a charity after the death of the last individual beneficiary. (R. A-67 - A-68.)

As the Tax Court noted (R. A-155), the provisions of Paragraph Sixth were quite stringent in enumerating the circumstances under which the trustees of that trust could sell or mortgage the property. Those provisions specified that the property could be sold only if a suitable tenant could not be found, and any additional mortgage could be used only to improve the real property. However, in Paragraph Seventh, the decedent was careful to specify that the property could be mortgaged and the borrowed sum paid to the wife, who was the executrix of the will as well as the initial and principal income beneficiary

under all three trusts, "if so requested by her in writing and/or used, in whole or in part, to pay and discharge any Federal of [sic] New York State Estate or Inheritance Taxes under any provisions of this, my Will." (R. A-155.) Thus, it is not unreasonable to read the crucial passage of Paragraph Seventh--in light of the restrictive provisions regarding mortgage or sale appearing in Paragraph Sixth--as providing a source of funds to pay federal and state estate tax liabilities, as well as to fund the income payments to his wife who, the trustees agree, was the decedent's principal concern. (R. A-82.) This is particularly so when one considers the important fact that the trust containing this borrowing power had as its res the largest single asset held in trust, the net value of the Manhattan property being $502,235.37, as contrasted with the net value of $237,000 and the gross value of $140,633.94 of the Long Island property and the agreement, respectively. (R. A-140 - A-146.) The crucial paragraph does not begin with language indicating any intent on the decedent's part to make any additional gift to the wife, but instead stresses his concern that the trustees "certify in writing that it is requisite, necessary or desirable to borrow a sum of money." (R. A-145.) Clearly, the trustees' dual charge under Paragraph Seventh are to make certain that sufficient resources are available to pay the estate tax liabilities arising under any provisions of the will,

and that sufficient funds are availabe to pay the income beneficiaries their anticipated yearly amounts.

Nor did the Tax Court err in refusing to give controlling effect to testimony of the decedent's attorney to the contrary, that the decedent's "intention was to give his wife $200,000 if she needed it." (R. A-157.) The attorney clearly testified that there was no error in the will's reflection of the testator's intent, since Paragraph Seventh was drafted in the exact language demanded by the decedent. (R. A-91, A-157.) In these circumstances, then, the general rule which prevails in New York is that parole evidence may not be utilized to "contradict, enlarge or vary" the written words of the will which clearly reflect the testator's intent. Brown v. Quintaid, 177 N.Y. 75, 83, 69 N.E. 225 (1903); Matter of Smith, 254 N.Y. 283, 289-290, 172 N.E. 499 (1930). Accord, Matter of Service, 49 Misc. 2d 399, 400, 401, 267 N.Y.S. 2d 782, 784 (N.Y. Surr., 1965), holding that direct statements of intent by the testator are not admissible in contravention of the clear language of the will, citing IX Wigmore, Evidence (McNaughton rev., 1940), § 2471, pp. 229-230. As the court in In re Gilmour's Estate, 18 App. Div. 2d 154, 157, 238 N.Y.S. 2d 624, 628 (1963) stated, in holding that the testator's intent as reflected in the language of his will is controlling, in interpreting such will, "When the purpose of a testator is reasonably clear by reading his words in their natural and common

sense, the courts have not the right to annul or pervert that purpose upon the ground that a consequence of it might not have been thought of or intended by him." See, generally, In re Estate of Fried, 445 F. 2d 979 (C.A. 2, 1971), cert. denied, 404 U.S. 1016 (1972) and Estate of Opal v. Commissioner, 450 F. 2d 1085 (C.A. 2, 1971), aff'g 54 T.C. 154 (1970); cf. Estate of Neugass v. Commissioner, 65 T.C. 188 (1976), on appeal (C.A. 2, No. 76-4112); Estate of Tilyou v. Commissioner, 470 F. 2d 693 (C.A. 2, (1972); Estate of Mittleman v. Commissioner, 522 F. 2d 132 (C.A. D.C., 1975). As we have noted, therefore, the testator's intent as expressed in his will was that the trustees of the trust established under Paragraph Seventh of his will be authorized to borrow on the trust res in order to be able to make funds up to $200,000 available to the wife, as executrix, either to pay the estate tax liability of the estate, or to pay herself the amounts which were due her, under the terms of decedent's will. Since the will failed to make provision for additional benefits payable to her in the sum of $200,000, the estate's marital deduction is limited to those amounts already credited in favor of the wife, concerning which a marital deduction has already been allowed. Sec. 2056(a), supra.[5/]

5/ Nor does the fact that the other income beneficiaries and the remainderman of the trust acquiesced in the $200,000 payment in the accounting proceedings alter the case in any way, since in the application of a federal statute the Government is not bound by the determinations of a state trial court in proceedings in which the Federal Government is not a party. Estate of Bosch v. Commissioner, 387 U.S. 456 (1967).

Additionally, the Tax Court's conclusion that the estate was not entitled to a marital deduction for the $200,000 paid to the decedent's widow is fully supported on another ground. Even if extraneous evidence was admissible to demonstrate that the testator's intent in drafting Paragraph Seventh was two-fold--to permit the trustees to borrow in order to provide a source for payment of estate taxes, and also to provide the wife with an additional elective bequest of $200,000--this testamentary provision amounted to a nondeductible "terminable interest," within the meaning of Section 2056(b)(1) of the 1954 Internal Revenue Code, Appendix, infra. Generally, an interest in property "must pass outright to the surviving or donee spouse" (S. Rep. No. 1013, 80th Cong., 2d Sess., p. 28 (1948-1 Cum. Bull. 285, 305)) before the estate is entitled to claim a marital deduction for such property interest.[6/]

6/ Section 2056(b)(5) of the Code, Appendix, infra, provides that an interest shall be considered as passing to the surviving spouse, if under such interest the surviving spouse "is entitled for life to all the income from the entire interest, * * * with power in the surviving spouse to appoint the entire interest." The taxpayer asserts that her interest in the $200,000 qualifies under this provision. (Br. 34, et seq.) However, this statutory provision is clearly inapplicable here. Even assuming that testator's intent was to authorize the trustees to borrow money to pay the executrix so that she could have funds to do either or both of two things, pay estate taxes and an additional sum to be selected by her, individually--the bequest fails to provide her with either a life estate in that sum, or a power of appointment in the sum. That is, taxpayer's contention is that she is entitled to elect to receive complete ownership of the $200,000 by notifying the trustees of her intention to receive that amount. Moreover, even if the wife's interest could be construed as providing some sort of life estate, plus a power to appoint, her power to appoint was contingent upon the trustees' first certifying the need to borrow money to fund the additional bequest, and was also contingent upon the executrix' first determining that the borrowed money was not needed to pay estates taxes. Thus, the wife's power was "limited," was not exercisable in all events, and accordingly failed to comply with the provisions of Section 2056(b)(5). See Treasury Regulations on Estate Tax (1954 Code), Sec. 20.2056(b)-5(a)(4) and Sec. 20.2056(b)-5(g)(1)(ii) and (3), Appendix, infra.

Thus, Section 2056(b)(1), consistent with the objective of Congress to limit the marital deduction to "outright" bequests, disallows the marital deduction with respect to certain terminable interests. It provides (Sec. 2056(b)(1)):

> (b) Limitation in the Case of Life Estate or Other Terminable Interest.--
>
> (1) General rule.--Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest--
>
> (A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and
>
> (B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;
>
> * * *

As this Court stated in Allen v. United States, 359 F. 2d 151, 154 (1966), cert. denied, 385 U.S. 832 (1966):

> A terminable interest is defined, in general, as one which possesses the three characteristics found in sections 2056(b)(1)(A) and (B). First, it must be an interest in property which will terminate upon the occurrence or non-occurrence of an event or upon the lapse of time. Second, another interest in the same property must pass or have passed to someone other than the spouse from the decedent for less than an adequate consideration. And third, such other person must be able to possess or enjoy a part of such property upon the termination of the spouse's interest.

And see In re Reilly's Estate, 239 F. 2d 797, 799 (C.A. 3, 1957).

The Senate Finance Committee in explaining the concept behind the terminable interest rule specifically noted that the rule

applies (S. Rep. No. 1013, Part. 2, 80th Cong., 2d Sess., p. 12 (1948-1 Cum. Bull. 331, 339)):

> * * * If any person (other than the surviving spouse) or his heirs or assigns may by any possible circumstances under the terms of the bequest possess or enjoy any part of the property in which the surviving spouse's interest is an interest. (Emphasis added.)

And the Senate Committee further emphasized that an interest is deemed to be terminable if it is subject to any kind of condition or contingency (S. Rep. No. 1013, Part 2, supra, p. 7 (1948-1 Cum. Bull., p. 336)):

> It is not necessary under such subparagraph (B) that the contingency or event must occur or fail to occur in order to make the interest terminable. Thus a terminable interest under such subparagraph includes an interest bequeathed to the surviving spouse as long as she resides in Washington, D.C. On the other hand, it includes interests which will in all events terminate, such as an estate for the life of the surviving spouse.
>
> Subparagraph (B) is intended to be all-encompassing with respect to various kinds of contingencies and conditions. Thus, it is immaterial whether the interest passing to the surviving spouse is considered as a vested interest subject to divestment or as a contingent interest. Subparagraph (B) applies whether the terms of the instrument or the theory of their application are conceived as creating a future interest which may fail to ripen or vest or as creating a present interest which may terminate. The occurrence of a contingency includes the ending of a condition. Thus, an interest given to the surviving spouse as long as she remains unmarried is a terminable interest.

Thus, the question which arises is whether the wife, at the moment of the decedent's death, had an indefeasible interest in the $200,000. See Jackson v. United States, 376 U.S. 503,

507 (1964). Here, the testator clearly provided that three acts after his death must occur before the wife's right to the $200,000 becomes certain: (1) the trustees must "certify in writing that it is requisite, necessary or desirable to borrow a sum of money," (2) the wife must request in writing that the borrowed sum be paid over to her, and (3) the wife must determine that the borrowed money is not needed for payment of estate taxes. (R. A-145.) Until the occurrence of those three events, the wife's right to receive the additional sum in question was contingent and uncertain. As the Supreme Court in Jackson, supra, stated (376 U.S., pp. 509-510):

> * * * there is no provision in the Code for deducting all terminable interests which become nonterminable at a later date and therefore taxable in the estate of the surviving spouse if not consumed or transferred. The examples cited in the legislative history make it clear that the determinative factor is not taxability to the surviving spouse but terminability as defined by the statute. [S. Rep. No. 1013, Part 2, supra, pp. 10, 11, 51 (1948-1 Cum. Bull., pp. 337, 338, 341).]

In Allen v. United States, supra, the decedent had, in Part I of his will, left his entire estate to his surviving spouse, Kathleen, on the condition that she "sign and execute an agreement suitable to the Surrogate * * * to make a Will and leave her estate * * * to be shared in equal parts among [decedent's] four children * * *" Allen v. United States, supra, p. 153. In the event the required agreement was not executed, Part II of the will bequeathed to the surviving spouse her statutory share of the estate with the residue going to the daughter of decedent's first marriage. Applying

the established principles of Jackson v. United States, supra, this Court, in ruling that the bequest ran afoul of the terminable interest rule, held (359 F. 2d, p. 154):

> Viewed at the moment of his death, the bequest to Allen's spouse under Part 1 of his will was subject to at least two contingencies, each of which could have caused it to fail: (1) Kathleen might not have elected to take under Part I at all; or (2) even if she had executed the agreement to devise all of her property to Allen's four childeren equally, there remained the need for the Surrogate's approval and the possibility that he might not give it.

And see Estate of Ray v. Commissioner, 54 T.C. 1170 (1970); Estate of Neugass v. Commissioner, 65 T.C. 117 (1975), on appeal (C.A. 2, No. 76-4112);[6/] but cf. Estate of Mackie v. Commissioner, 64 T.C. 308 (1975), on appeal (C.A. 4, No. 76-1206).[7/] See also

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6/ In Estate of Neugass v. Commissioner, supra, p. 120, the decedent bequeathed to his wife a life interest in decedent's art collection, with the option to elect absolute ownership of any item in that collection within six months of decedent's death. In upholding the Commissioner's disallowance of a marital deduction with respect to the artwork in which the wife had elected to take an absolute ownership, within the six-month period, the Tax Court emphasized that "At the moment of decedent's death, Mrs. Neugass had not made her election to take absolute ownership of any items in the art collection."

7/ In Estate of Mackie v. Commissioner, supra, the decedent bequeathed to his wife the maximum amount of the marital deduction, provided that the wife accept the bequest within four months of decedent's death or be deemed to have rejected it. The Tax Court ruled the wife "was given the absolute right to take outright a specified portion of decedent's estate" which did not constitute a terminable interest, distinguishing Allen v. United States, supra, as a case where the "bequest was held nondeductible because conditioned on the beneficiary's performance of acts in addition to merely accepting the bequest." Estate of Mackie v. Commissioner, supra, pp. 313-314. While the Commissioner contends that the Tax Court misapplied the controlling federal legal principles in failing to conclude that the wife's interest was a terminable one, that case is in any event distinguishable from the instant case, where far more was required than the individual beneficiary's acceptance of the bequest.

Estate of Tilyou v. Commissioner, supra, pp. 695, 697 where this Court ruled that a bequest to decedent's wife which provided that distribution should go to the decedent's children "In the event * * * of the death of my wife * * * before she shall have become entitled to any part of share of my residuary estate," under New York law gave the wife "equitable title, at least, vested as of the date of death," and thus did not constitute a terminable interest.

In this case, then, the wife's interest in the $200,000 was contingent upon the three acts enumerated above, which had to occur after the decedent's death. Absent the occurence of any one of those facts, the wife would not have received the $200,000, her personal right to elect to receive the $200,000 as an individual beneficiary would expire upon her subsequent death, and the benefits of the $200,000 would ultimately pass to the remainderman, without consideration, at the termination of the wife's right of election. Clearly, the wife's interest in these circumstances is a terminable one, and the Tax Court's denial of the estate's claim for a marital deduction with respect to the $200,000 is correct and should be affirmed by this Court.

THE TAX COURT WAS CORRECT IN RULING THAT, UNDER APPLICABLE STATE LAW, A PORTION OF THE FEDERAL ESTATE AND STATE INHERITANCE TAXES ATTRIBUTABLE TO LIFE ESTATES PRECEDING CHARITABLE REMAINDERS WERE REQUIRED TO BE CHARGED AGAINST THE CORPUS OF RESIDUARY TRUSTS, THUS REDUCING THE AMOUNT OF THE ALLOWABLE CHARITABLE DEDUCTION AUTHORIZED UNDER SECTION 2055 OF THE INTERNAL REVENUE CODE OF 1954

The second issue raised on this appeal concerns the propriety of the Tax Court's conclusion that the amount of the charitable deduction available to the estate for bequests to charities under the trusts as remainderman should be reduced by the amount of the estate and inheritance taxes payable out of such bequests, under the laws of the State of New York. (R. A-158, A-160.) Section 2055(c) of the Internal Revenue Code of 1954, Appendix, infra, provides that if--

> "estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible [as a charitable bequest] under this section, then the amount deductible * * * reduced by the amount of such taxes."

The Tax Court, after a careful examination of all of the relevant provisions of the decedent's will, concluded (R. A-160 - A-162) that the decedent had failed to clearly express an intent that the state apportionment statute not control payment of such taxes. Accordingly, the Tax Court applied the provisions of Section 2-1.8 of the Estates, Powers and Trusts Law of the State of New York, McKinney's Consol. Laws of N.Y. Ann. which requires that the tax attributable to temporary interests preceding a

remainder be charged against the principal of the fund.[8/] On appeal the taxpayer (Br. 39 et seq.) asserts that apportionment was directed by the decedent, and that the Tax Court erred in ruling that the amount of the deduction for the charitable remainders should be reduced by the amount of taxes attributable to the temporary interests in the property involved.

8/ Section 2-1.8 of the Estates, Powers and Trusts Laws, McKinney's Consol. Laws of N.Y. Ann.) states:

> § 2-1.8 Apportionment of federal and state estate or other death taxes; fiduciary to collect taxes from property taxes and transferees thereof
>
> (a) Whenever it appears in any appropriate action or proceeding that a fiduciary has paid or may be required to pay an estate or other death tax, under the law of this state or of any other jurisdiction, with respect to any property required to be included in the gross tax estate of a decedent under the provisions of any such law (hereinafter called "the tax"), the amount of the tax, except in a case where a testator otherwise directs in his will, and except where by any instrument other than a will (hereinafter called a "non-testamentary instrument") direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such non-testamentary instrument, shall be equitably apportioned among the persons interested in the gross tax estate, whether residents or non-residents of this state, to whom such property is disposed of or to whom any benefit therein accrues (hereinafter called "the persons benefited") in accordance with the rules of apportionment herein set forth, and the persons benefited shall contribute the amounts apportioned against them.
>
> (b) Unless otherwise provided, when a disposition is made by which any person is given an interest in income or an estate for years or for life or other temporary interest in any property or fund, the tax apportionable against such temporary interest and the remainder limited thereon is chargeable against and payable out of the principal of such property or fund without apportionment between such temporary interest and remainder. The provisions of this paragraph apply although the holder of the temporary interest has rights in the principal, but do not apply to a common law annuity.

The Commissioner submits that a careful reading of the decedent's will discloses no clear intent upon the part of the decedent to negate the strong policy of the State of New York in favor of apportionment, and that the failure of the taxpayer to meet its burden of proof of establishing that testator intended there to be no apportionment of taxes between the beneficiaries of his estate warrants affirmance of the Tax Court's ruling on this issue. See Matter of Pepper, 307 N.Y. 242, 246, 250, 120 N.E. 2d 807, 808, 811 (1954), noting that the provisions of Section 124 of the Decedent's Estate Law, the predecessor of Section 2-1.8 of the Estates, Powers and Trusts Law, supra, is "remedial in nature and its direction in favor of apportionment is to be carried out unless there is a clearly expressed intention to the contrary in the will."[9/]

8/ (continued)

> (c) Unless otherwise provided in the will or non-testamentary instrument:
>
> (1) The tax shall be apportioned among the persons benefited in the proportion that the value of the property or interest received by each such person benefited bears to the total value of the property and interest received by all persons benefited, the values as finally determined in the respective tax proceedings being the values to be used as the basis for apportionment of the respective taxes.

9/ As the Tax Court appreciated, (R. A-159) state law generally governs the apportionment of federal and state inheritance taxes. Matter of King, 22 N.Y. 2d 456, 460, 239 N.E. 2d 875 (1968); Rizzo v. Del Drago, 317 U.S. 95 (1942).

It will be remembered from the previous discussion of the decedent's will that the decedent in this case bequeathed the residue of his estate to his wife, after making specific dispositions of property to particular individuals (in Paragraph Fifth of his will), and after bequeathing three particular assets in three separate trusts (in Paragraphs Sixth through Eighth of his will). No clause appears in the decedent's will specifically announcing the decedent's intention that each beneficiary bear his proportionate share of estate taxes, nor is there any clause specifying that taxes are to be paid out of the residue of the decedent's estate. The taxpayer, however, points out that under the provisions of Paragraphs Sixth (a) and Seventh (a) of his will the testator directed that the income from the real property constituting the corpus of the two trusts established under those paragraphs be used to pay federal and state estate and inheritance taxes. The Tax Court, however, reasoned that these provisions were intended not to contravene the policy of apportionment expressed in the New York statute, but only to refer to the source of funds to be used to pay such costs, as well as other administrative expenses of the trusts. Cf. Matter of Mathews, 164 Misc. 578, 300 N.Y.S. 461 (N.Y. Surr. 1937); Rev. Rul. 73-98, 1973-1 Cum. Bull. 408.

This view is supported, as the Tax Court held (R. A-161 - A-162), by the additional provision in Paragraph Seventh, authorizing the trustees to loan up to $200,000 to the executrix to provide a fund for payment of the estate and inheritance taxes, which would require a large sum of money. And, as the Tax Court noted (R. A-161), Paragraph Eighth of the testator's will contains the same provision for payment of estate and inheritance taxes that the two earlier paragraphs contain, but in that paragraph it is the "principal" which is to be expended to satisfy such taxes--a direction which appears to refer to both principal and income.

In sum, the will, properly construed, does not avoid the application of the New York apportionment statute, and the burden of these estate and inheritance taxes is chargeable to the charitable remainders, thus reducing the amount of the charitable deduction allowable under Section 2055(c). The decision of the Tax Court in this regard should be affirmed.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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AUGUST, 1976.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 26th day of August, 1976, in an envelope, with postage prepaid, properly addressed to him as follows:

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2055. TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES.

* * *

(c) Death Taxes Payable Out of Bequests.--If the tax imposed by section 2001, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this section, then the amount deductible under this section shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes.

* * *

SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(a) Allowance of Marital Deduction.--For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) Limitation in the Case of Life Estate or Other Terminable Interest.--

(1) General rule.--Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest--

* * *

(5) Life estate with power of appointment in surviving spouse.--In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor) of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse--

* * *

Treasury Regulations on Estate Tax (1954 Code) (26 C.F.R.):

§ 20.2056(b)-5 Marital deduction: life estate with power of appointment in surviving spouse.

(a) In general. Section 2056(b)(5) provides that if an interest in property passes from the decedent to his surviving spouse (whether or not in trust) and the spouse is entitled for life to all the income from the entire interest or all the income from a specific portion of the entire interest, with a power in her to appoint the entire interest or the specific portion, the interest which passes to her is a deductible interest, to the extent that it satisfies all five of the conditions set forth below (see paragraph (b) of this section if one or more of the conditions is satisfied as to only a portion of the interest):

* * *

(4) The power in the surviving spouse must be exercisable by her alone and (whether exercisable by will or during life) must be exercisable in all events.

* * *

(g) Power of appointment in surviving spouse. (1) The conditions set forth in paragraph (a) (3) and (4) of this section, that is, that the surviving spouse must have a power of appointment exercisable in favor of herself or her estate and exercisable alone and in all events, are not met unless the power of the surviving spouse to appoint the entire interest or a specific portion of it falls within one of the following categories:

> (i) A power so to appoint exercisable in favor of her estate. Such a power, if exercisable during life, must be fully exercisable at any time during life, or, if exercisable by will, must be fully exercisable irrespective of the time of her death (subject in either case to the provisions of § 20.2053 (b)-3, relating to interests conditioned on survival for a limited period); or

* * *

(3) A power is not considered to be a power exercisable by a surviving spouse alone and in all events as required by paragraph (a)(4) of this section if the exercise of the power in the surviving spouse to appoint the entire interest or a specific portion of it to herself or to her estate requires the joinder or consent of any other person. The power is not "exercisable in all events", if it can be terminated during the life of the surviving spouse by any event other than her complete exercise or release of it. Further, a power is not "exercisable in all events" if it may be exercised for a limited purpose only. For example, a power which is not exercisable in the event of the spouse's remarriage is not exercisable in all events. Likewise, if there are any restrictions, either by the terms of the instrument or under applicable local law, on the exercise of a power to consume property (whether or not held in trust) for the benefit of the spouse, the power is not exercisable in all events. Thus, if a power of invasion is exercisable only for the spouse's support, or only for her limited use, the power is not exercisable in all events. In order for a power of invasion to be exercisable in all events, the surviving spouse must have the unrestricted power exercisable at any time during her life to use all or any part of the property subject to the power, and to dispose of it in any manner, including the power to dispose of it by gift (whether or not she has power to dispose of it by will).

* * *